

What is a FIDUCIARY?

What services do fiduciaries provide?

When do I need a fiduciary?

How do I find a qualified fiduciary to help me?

An increasing number of retirees are moving to Arizona leaving behind families and support services upon which they have relied for most of their lives. Many new services have developed in Arizona to assist with the special needs of these retirees, as well as persons with serious mental illness and developmental disabilities.

The purpose of this booklet is to provide a general understanding of the various roles in which fiduciaries serve and the assistance fiduciaries are able to provide clients and their families.

This information will assist individuals and families in recognizing when fiduciary services are needed and how to locate and choose a qualified fiduciary in Arizona.

A public information booklet by
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WHAT IS A FIDUCIARY?

A **fiduciary** is someone who accepts the responsibility for taking care of the needs or property of another person for the benefit of that person. The fiduciary serves in a role of trust. The person served by a fiduciary places trust in the fiduciary to manage his or her affairs solely for his or her benefit and not for the fiduciary's benefit. The element of trust becomes crucial when the person receiving services is frail, vulnerable and incapacitated.

"Fiduciary" is a term which covers a variety of roles in which individuals serve in positions of trust. Fiduciaries serve by court-appointment as guardians, conservators or personal representatives of estates. They also serve by agreement as trustees, representative payees for Social Security income or other income benefit plans, or as agents under powers of attorney.

Each county in Arizona has a **probate court** which is part of the state's superior court system. The probate court appoints guardians for incapacitated persons, conservators for persons whose assets require protection, and personal representatives for the administration of decedents' estates.

In Arizona persons serving as fiduciaries for a fee must be certified by the state. All fiduciaries, whether serving for a fee or not, are governed by state law.

In Arizona there are public fiduciaries and private fiduciaries. In each county a **public fiduciary** is appointed by that county's board of supervisors and must be certified by the state. The public fiduciary may be appointed by the court to serve as guardian, conservator or personal representative of an estate when there is no one else willing or capable of serving. Fees for services by public fiduciaries and their staffs must be approved by the court and are paid by the estate if it has sufficient funds.

A **private fiduciary** is a non-family member who serves professionally, that is, for a fee, and who must be certified by the state. The private fiduciary may be appointed by the court to serve as guardian, conservator or personal representative of an estate when the fiduciary is not a beneficiary of that estate. Private fiduciaries may also serve by agreement as trustees, representative payees or as agents under powers of attorney.

Private fiduciaries charge hourly rates or fees for specific services. All fees must be approved by the court. The court determines case by case which fees are reasonable and payable by the estate.

Public and private fiduciaries are not caregivers. A caregiver is someone who provides personal care such as assisting in bathing, dressing, personal hygiene, and doing household chores and shopping. Fiduciaries do not provide these services, but arrange for them when needed.

ROLES IN WHICH FIDUCIARIES SERVE

A **Guardian** is appointed by the probate court to ensure that the personal and medical needs of an incapacitated person are met. A person is determined by the court to be incapacitated when he or she lacks sufficient understanding or “capacity” to make or communicate responsible decisions concerning his or her daily living needs. Incapacity is usually a result of physical or mental illness, accident or dementia.

If the court determines that a person is incapacitated and there is a demonstrated need for a guardian, it will appoint an appropriate person according to state law to serve as guardian. The incapacitated person then becomes the legal responsibility of the guardian. Each year the guardian must report to the court of progress made in managing the ward’s personal affairs.

A **Conservator** is appointed by the probate court to manage the financial affairs of someone who is determined by the court to be unable to manage his or her own finances or property. The conservator manages the assets of the protected person for his or her benefit under the court’s supervision. Each year the conservator must file an accounting with the court and receive the court’s approval. This annual accounting must balance from year to year and show all receipts and disbursements made during the year.

A **Personal Representative** is appointed by the probate court to administer the estate of a person who died, who is referred to as the “decedent”. The personal representative is responsible for identifying, inventorying and protecting all of the assets in the estate, paying bills and allowable claims against the estate, locating all of the heirs and beneficiaries, paying the administrative costs of probating the estate, and distributing the remaining assets to the heirs or beneficiaries.

A **Representative Payee** is designated by the Social Security Administration or other income benefit plans to receive the income and pay the expenses of an individual who is not able to do so.

A **Trustee** manages property held by a trust. A trust is a legal entity created by one or more persons called “trustors,” who appoint a trustee to manage the trust’s assets according to the terms of the trust. Trustors usually name themselves as the primary beneficiaries during their lifetime. Upon creating a trust, the trustors then transfer ownership of their properties and financial accounts to the trust. The trustee then manages those assets for the benefit of the trustors or the beneficiaries named in the trust.

Trustors may serve as trustees of their own trust. An important element of a trust is that it names a “successor trustee” who will take over when the current trustee dies, resigns or becomes unable to manage the trust. The trust agreement instructs the trustee how the estate is to be managed during the lifetime of the trustors, and managed, distributed and settled following their deaths.

Because of their experience in managing and settling estates, private fiduciaries are often

designated successor trustees. Banks also may serve as trustees. While certified fiduciaries are usually paid by the hour or for specific services they provide, banks are paid a percentage of the estate's value to manage and invest the trust's assets.

It is important to remember that a trust is created to manage the assets of trustors, not to manage their personal care. Trustors often arrange with the fiduciary designated as successor trustee to also manage their personal care, if and when needed, through powers of attorney.

A **Power of Attorney** is a legal statement by an individual, the "principal," which authorizes another person, the "agent," to act and make decisions for the benefit of the principal. Powers of attorney are used for making financial and medical decisions and for other purposes. The principal must have the capacity to understand what he or she is signing and what power or powers he or she is giving to the agent.

HOW A GUARDIAN OR CONSERVATOR IS APPOINTED

The process of appointing a fiduciary as a guardian or conservator may be initiated by anyone who believes an individual may need assistance with his or her activities of daily living and/or finances. That person may begin by contacting the family's attorney or a fiduciary of their choice. The fiduciary will investigate the situation and, if there appears to be a demonstrated need and there is no other alternative, the fiduciary will retain an attorney to petition the probate court for appointment as guardian or conservator.

Once the petition for appointment is filed with the probate court, the court appoints an attorney to represent the alleged incapacitated person. A court-appointed examiner (physician, psychologist or registered nurse) will examine the alleged incapacitated person and report his or her findings to the court. A court investigator is also appointed by the court to investigate whether there is a need for a guardian and/or conservator and to recommend a suitable person to serve in those roles.

A court hearing is held to consider all the necessary and relevant information. The court decides whether the person is incapacitated or in need of protection and, accordingly, appoints a guardian, conservator or both.

There are costs involved in petitioning the court and in the investigative process. If the court appoints a guardian or conservator, these costs are usually paid by the incapacitated person's estate. If an appointment is not made, the petitioner may be required to pay all of the costs incurred.

HOW A PERSONAL REPRESENTATIVE IS APPOINTED

A will typically names a personal representative. Individuals, private fiduciaries or banks may be named. The party named may petition the probate court for informal or formal appointment depending upon the complexity of the estate. An attorney usually assists in this process. If the will is “proved,” that is, accepted by the court as valid, then the party named is appointed. However, if the will is challenged, a hearing is held and the court will decide whether the will is valid and who will serve as personal representative. If a person dies without a will, state law provides a list of parties who are eligible to serve as personal representative. A public or private fiduciary is appointed when those eligible are not available or do not wish to serve as personal representative.

At various stages during the probate process the personal representative must report to the heirs and beneficiaries about the administration of the estate. In certain cases the personal representative is required to report to the court and obtain its approval to settle the estate.

FINDING AND CHOOSING A QUALIFIED FIDUCIARY

Under state law professional fiduciaries must be certified with the **Arizona Supreme Court** in order to be eligible for appointment by a probate court as a guardian, conservator or personal representative. State law requires that to become certified, fiduciaries must meet certain eligibility requirements, take initial training, pass a test, post a bond, furnish a set of fingerprints and pass a criminal background check. Certification must be renewed every two years.

A list of state-certified fiduciaries may be obtained by writing to: Fiduciary Certification Program, Arizona Supreme Court, 1501 West Washington, Suite 104, Phoenix, AZ 85007-3327. The list may also be found at www.supreme.state.az.us/fiduc on the internet.

Family members are not required to be certified by the state in order to serve as fiduciaries for their own family members.

The **National Guardianship Foundation** (NGF) offers an education and certification program for fiduciaries nationwide. Many of Arizona’s professional fiduciaries have achieved NGF certification as Registered Guardian and Master Guardian. Qualification requires meeting certain minimum requirements, passing an examination and fulfilling continuing education requirements. NGF certifications must be renewed every two years.

A list of NGF’s Registered Guardians and Master Guardians may be obtained by writing to: National Guardianship Association, 1604 North Country Club Road, Tucson, AZ 85716-3102. The list may also be found at www.guardianship.org on the internet under National Guardianship Foundation.

The **Arizona Attorney General** is required by state law to keep a registry of names of persons against whom complaints have been filed accusing them of abuse, neglect or exploitation of a vulnerable person. Information from this registry is available to the public by writing to: Custodian of the Registry, Elder Affairs Program, Office of the Attorney General, 1275 West Washington, Phoenix, AZ 85007.

If you wish to choose a private fiduciary, it is recommended that a list of qualified fiduciaries be obtained through the sources listed above. You may also want to seek the advice of other professionals who specialize in probate and estate planning, such as attorneys, financial advisors, securities brokers, tax accountants and banking representatives. Various local public and private agencies on aging and elder affairs may also provide useful information and advice.

Finally, it is most important when you need a fiduciary, that you choose one with whom you can maintain a long-term trusting relationship.

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